Supreme Court, U.S.
FILED
NOV 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-560

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FMC WYOMING CORPORATION,

Petitioner,

v.

DONALD P. HODEL, Secretary of the Interior, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICUS CURIAE BRIEF OF COLOWYO COAL COMPANY IN SUPPORT OF THE PETITIONER

CLYDE O. MARTZ
(Counsel of Record)
JON N. HALVERSON
CHARLES L. KAISER
Davis, Graham & Stubbs
370 Seventeenth Street
Denver, Colorado 80202
(303) 892-9400

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-560

FMC WYOMING CORPORATION,

Petitioner,

v.

DONALD P. HODEL, Secretary of the Interior, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Colowyo Coal Company ("Colowyo") respectfully submits this amicus curiae brief urging the Court to grant certiorari in this proceeding.[1]

INTEREST OF THE AMICUS CURIAE

Colowyo is one of many federal coal lessees who are now, or will be, severely prejudiced in the ongoing operation of their leases if the issues raised by the Tenth Circuit's decision are not promptly resolved. First, its vested rights in a federal coal lease

---

[1] Colowyo has filed separately with the Clerk consents of the parties to participate in this proceeding in an amicus curiae capacity.

issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976 ("FCLAA"), Pub. L. 94-377, 90 Stat. 1087, are substantially curtailed if the Tenth Circuit's decision properly states the law. Colowyo owns a lease issued in 1924, soon after Congress enacted the Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1970), and over a half-century before FCLAA's enactment. The terms of that lease may be readjusted only as necessary, in Congress' words, to "meet materially changed conditions" arising subsequent to the last lease readjustment. Colowyo developed that lease in reliance on those rights at a capital cost exceeding $100 million. And the Tenth Circuit's decision, if adopted generally, will result in imposition of royalties that are wholly inconsistent with those rights and that an independent commission has concluded have no basis in fact and are unconscionably high in all but extraordinary circumstances.[2] Second, Colowyo believes that the Tenth Circuit's decision, if adopted generally, will substantially alter the future course of coal development in the United States. Many undeveloped coal deposits will never be mined. Coal from existing mines that lessees planned to mine will not be produced. And the long-standing national policy to ensure energy independence at least partially through development of plentiful domestic coal supplies will be thwarted.

REASONS FOR GRANTING CERTIORARI

Colowyo submits that the Court should grant certiorari because the Tenth Circuit has decided (i) "an important question of federal law which has not, but should be, settled by this Court" and (ii) "a federal question in a way in conflict with applicable

---

[2] The Commission On Fair Market Value Policy For Federal Coal Leasing, established by Pub. L. 98-63, 97 Stat. 63 (1983), found that there is no basis for a uniform 12.5 percent royalty and concluded that such a royalty "might be reasonable for some highly efficient mining operations" where surface mining is extremely efficient and coal mining costs are very low. Final Report Of The Commission On Fair Market Value Policy For Federal Coal Leasing, pp. 313-319 (1984).

decisions of this Court." Supreme Court Rule 17.1(c). In particular:

I. DEFINITIVE RESOLUTION OF ISSUES RAISED BY THE TENTH CIRCUIT'S DECISION IS NEEDED NOW TO SETTLE EVER INCREASING NUMBERS OF DISPUTES ARISING BEFORE THE COURTS AND THE DEPARTMENT.

This case requires construction of federal statutes of general applicability and overwhelming importance to all who seek to develop federal coal deposits owned by the United States, to all who purchase that coal to generate electricity, and to all who consume that electricity. The issues raised here are now pending in scores of administrative proceedings before the Interior Board of Land Appeals and nearly a dozen judicial proceedings in federal district courts within the Ninth, Tenth and District of Columbia Circuits.[3] The issues now before this Court will be raised in probably hundreds of additional administrative and judicial proceedings that will arise as the nearly 500 remaining federal coal leases issued prior to FCLAA's enactment are readjusted.[4] If the Court grants certiorari in this case, these issues will

---

[3] *See, e.g., Peabody Coal Co.* v. *Hodel*, No. 87-1359 (D.D.C. filed May 20, 1987); *Colowyo Coal Co.* v. *Hodel*, No. 87-2325 (D.D.C. filed August 21, 1987); *Western Fuels-Utah, Inc.* v. *Hodel*, No. 87-2669 (D.D.C. filed September 29, 1987); *Consolidated Coal Co. & Chevron Coal Co.* v. *Hodel*, No. CV 85-361 BLG-JFB (D. Mont. filed December 2, 1985); *Ark Land Company* v. *Hodel*, No. C85-313K (D. Wyo. October 1, 1987); *Powderhorn Properties* v. *Hodel*, No. 87-K-350 (D. Colo. filed March 10, 1987); *Trapper Mining Inc.* v. *Hodel*, No. 87-Z-979 (D. Colo. filed July 2, 1987); *Exxon Coal U.S.A., Inc.* v. *Hodel*, No. C87-0088 (D. Wyo. filed March 4, 1987); *Meadowlark Farms, Inc.* v. *Hodel*, No. C87-0024 (D. Wyo. filed January 18, 1987).

[4] There were 533 federal coal leases outstanding when FCLAA was enacted on August 4, 1976. *See, e.g.*, H. Rep. 681, 94th Cong., 2d Sess. 10, Table 4, *reprinted in* 1976 U.S. Code Cong. & Ad. News 1943, 1945. An Office of Technology Assessment report indicates that, as of March 1986, 489 pre-FCLAA leases were outstanding. U.S. Congress, Office of Technology Assessment, "Potential Effects of Section 3 of the Federal Coal Leasing Amendments Act of 1976 — A Special Report," p. 31 (Washington, D.C. U.S. Government Printing Office, March 1986).

be definitively addressed and federal courts, the Department, federal coal lessees, and coal purchasers can be guided accordingly. If the Court delays certiorari, all will continue to flounder. If certiorari is granted after a conflict develops in the circuits, those whose cases are decided before that time may not benefit from this Court's review and action. Proper administration of the courts requires that certiorari be granted now.

II. THE TENTH CIRCUIT'S CONCLUSION THAT CONGRESS RESERVED UNRESTRICTED POWER TO CHANGE THE PROVISIONS OF PREVIOUSLY ISSUED INDETERMINATE COAL LEASES IS WHOLLY INCONSISTENT WITH PERTINENT STATUTORY AUTHORITY, LEGISLATIVE HISTORY, AND LONG-STANDING ADMINISTRATIVE CONSTRUCTION.

Section 7 of the Mineral Lands Leasing Act provided, prior to enactment of FCLAA, (i) that the Department is to issue "indeterminate" coal leases, (ii) that those indeterminate leases are granted on the "condition" that the Secretary may readjust lease terms at twenty-year intervals, and (iii) that the Secretary may readjust a lease at twenty-year intervals "unless otherwise provided by law."[5] A key federal question presented is whether that statute reserved in Congress unrestricted authority to subject previously issued indeterminate federal coal leases to whatever new lease terms it later wished to impose. The Tenth Circuit held that it did.

The Tenth Circuit's conclusion conflicts with both the statutory language and the legislative intent of Mineral Lands Leasing Act Section 7. Section 7 specifically required grant of a unique kind of lease under federal law—an "indeterminate" lease rather

---

[5] Mineral Lands Leasing Act Section 7 provided:

> Leases shall be for indeterminate periods . . . [on the] condition that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of expiration of such periods. 30 U.S.C. § 207 (1970).

than a primary term or preferential right lease as mandated for other minerals[6]—because in Congress' judgment an indeterminate lease was necessary to provide stability "so that lessees will be willing to expend the money necessary for the thorough equipment of a large mine." 51 Cong. Rec. 14945 (1914) (Comments by Rep. Thomson); Solicitor's Opinion M-36939, 88 Interior Dec. 1003 (1981). The right of readjustment is narrow in keeping with the expansive rights granted by an indeterminate lease; the scope of the right to readjust is limited to lease modifications necessary to "meet materially changed conditions":

> Provision is made in this bill for such an adjustment of the terms and conditions of the lease at the end of the 20-year period as may *meet materially changed conditions*. 51 Cong. Rec. 14945 (emphasis added).
>
> *Conditions, however, may materially change from time to time*, and for this reason provision was made for readjustment of terms and conditions at the end of 20-year periods. S. Rep. 352, 61st Cong., 2d Sess. 3 (1914) (emphasis added).

And the "otherwise provided by law" statutory language, which merely modifies and is an aspect of the right of readjustment, is also narrow in keeping with the grant of broad, indeterminate

---

[6] "Primary term" leases, which are granted for oil and gas, require that production be achieved within a short period of time to prevent lease termination. "Preferential right" leases, which are granted for minerals such as sodium, vest a preferential, "first refusal" right in the lessee to reacquire a lease if the lessee agrees to whatever new lease terms and conditions the Secretary wishes to impose. The Department has formally contrasted preferential right lease renewals, where a lessee must take or leave whatever new terms and conditions the government wishes to impose, with coal lease readjustments, where lease terms and conditions must be readjusted reasonably in a manner consistent with grant of an indeterminate term lease. *See* Solicitor's Opinion, "Sodium Lease Renewals," GFS (MIN) S0-4, p. 6 (1982). ("We are of the opinion that . . . Congress knew of, and intended that there be, a difference between indeterminate leases subject to readjustment and 20-year leases with a preference right of renewal").

lease rights. The right of readjustment does not effectively reserve in Congress a power to change an indeterminate lease into a preferential right lease where a lessee is afforded only a right of first refusal to reacquire a lease on whatever new terms the government may require. The right of readjustment—including the reserved Congressional power—must be exercised in a manner consistent with the rights granted and the policies served by an indeterminate lease—the federal government is authorized, in the words of Congress, "to adjust each case according to the conditions that are present, having due regard for markets, transportation, and other conditions." H. Rep. 17, 62nd Cong., 2d Sess. 3, 4 (1916); H. Rep. 668, 61st Cong., 2d Sess. 3, 4 (1914).

The Tenth Circuit's decision also conflicts with a half-century of consistent administrative construction of Mineral Lands Leasing Act Section 7 by the Department. While the statute provided:

> that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods,

for over fifty years the Secretary granted leases such as those involved here that provided:

> [The Secretary reserves] the right to reasonably readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and each succeeding 20-year period during the continuance of the lease unless otherwise provided by law at the time of the expiration of any such period.

By using the word "reasonably" and by deleting the statutory language "such readjustment of terms and conditions may be made as the Secretary of the Interior may determine" when he granted leases, the Secretary effectively interpreted the "unless otherwise provided by law" language as a limitation on the right of readjustment at twenty-year intervals, not as an unrestricted reservation of power to require imposition of terms and conditions

inconsistent with the grant of an indeterminate lease. That contemporaneous and long-standing construction of a statute cannot be set aside without real analysis—an analysis never undertaken by the Tenth Circuit—[7] particularly where parties have relied upon that construction by investing billions of dollars. *See, e.g., Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 667-68 (1980); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457-58 (1978); *California* v. *Deseret Water, Oil and Irrigation Co.*, 243 U.S. 415, 421 (1917).

III. THE RETROACTIVE APPLICATION OF FCLAA IN THE ABSENCE OF ANY MANIFESTATION OF CONGRESSIONAL INTENT IS CLEARLY CONTRARY TO DECISIONS OF THIS COURT.

Even assuming, *arguendo*, that there are no limits on Congress' authority to impose whatever royalty and other terms it wishes when a pre-FCLAA, indeterminate lease is readjusted, a key federal question presented here is whether Congress exercised that authority and mandated through FCLAA the retroactive imposition of new burdens on leases that already had been developed. The Tenth Circuit held that Congress did so.

FCLAA statutory language does not support the Tenth Circuit's conclusion; to the contrary, while three other FCLAA provisions specifically refer to pre-FCLAA leases and are expressly applicable to them, nothing in FCLAA Section 6—the section the

[7] The argument that the "unless provided by law" language vests unrestricted authority in Congress to change indeterminate lease terms in any manner it wishes was only made in passing by the Secretary in the proceedings below—it was relegated to a footnote and referred to a federal district court case other than the FMC case where that argument had been expressly rejected. Secretary's Opening Brief, p. 27, n.11. Consequently, the argument was not satisfactorily briefed by the parties and was not soundly analyzed by the Court of Appeals. Colowyo respectfully submits that such summary treatment is unwarranted where so much is at stake.

Secretary relies on here—does so.[8] FCLAA legislative history does not support the Tenth Circuit's conclusion; to the contrary, while legislative history describing the three FCLAA provisions identified above refers to pre-FCLAA leases, nothing in the legislative history surrounding FCLAA Section 6 does so.[9] The Tenth Circuit's conclusion is supported only by silence—the Tenth Circuit held that "we find nothing in our reading of FCLAA (1976), or its legislative history, to indicate that FCLAA (1976) was *not* to be applied to pre-FCLAA leases on their post-FCLAA anniversary date." *FMC Wyoming Corp.* v. *Hodel*, 816 F.2d at 501 (emphasis added).[10]

Silence is not enough. This Court has held that "a retrospective operation will not be given to a statute which interferes with

---

[8] *See, e.g.*, FCLAA Section 3, 30 U.S.C. § 201(a)(2)(A) (1982) (specifically prevents the Secretary from issuing new leases to holders of pre-FCLAA leases who have not achieved commercial production by a prescribed time); FCLAA Section 5, 30 U.S.C. § 202(a)(5) (1982) (specifically provides that "leases issued before the enactment of this Act [FCLAA] may be included "in a logical mining unit"); FCLAA Section 13, 30 U.S.C. § 203 (1982) (specifically authorizes the Secretary to modify pre-FCLAA leases by grant of additional federal land).

[9] *See, e.g.*, H. Rep. 681, 94th Cong., 2d Sess. 15, *reprinted in* 1976 U.S. Code. Cong. & Ad. News 1943, 1951 (Pursuant to FCLAA Section 3, "Lessees would be prohibited from acquiring any *new federal lease* should they continue to hold *old leases* . . . without production therefrom" (emphasis added)); 122 Cong. Rec. 489 (1976) (FCLAA provisions are applicable "upon the inclusion of an *existing lease* in a logical mining unit" (emphasis added)); H. Rep. 681 at 26, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 1962 ("[FCLAA Section 13] amends [Mineral Lands Leasing Act] Section 3 to allow *modification of existing leases*" (emphasis added)).

[10] The Tenth Circuit's holding also rests upon the fact that when Congress amended FCLAA in 1978 it did not expressly provide that FCLAA Section 6 was not to be imposed upon pre-FCLAA leases at readjustment. 816 F.2d at 501, n.11. That conclusion cannot withstand scrutiny. In 1978 Congress considered and *rejected* an amendment that would have made clear that FCLAA Section 6 requirements *are* applicable to pre-FCLAA leases. Compare 124 Cong. Rec. 30, 372-73 (1978) with the Coal Leasing Amendments Act of 1978, Pub.L. 95-554, 92 Stat. 2073. Far from supporting the Tenth Circuit's decision, history surrounding the 1978 amendments supports our position.

antecedent rights unless such be the unequivocal and inflexible import of the terms and manifest intention of the legislature."[11] *Greene* v. *United States*, 376 U.S. 149, 166 (1964); *Union Pacific Railroad Co.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913). In concluding otherwise, the Tenth Circuit acted contrary to settled law developed by this Court.

CONCLUSION

For these reasons Colowyo respectfully prays this Court to grant certiorari in this case. If certiorari is granted, petitioner will demonstrate to this Court that the Department must examine materially changed conditions that have arisen subsequent to the last readjustment of a pre-FCLAA lease and must impose royalty and other terms that are fair to both lessees and the United States.

Respectfully submitted,

Clyde O. Martz
(Counsel of Record)
JON N. HALVERSON
CHARLES L. KAISER
Davis, Graham & Stubbs
370 Seventeenth Street
Denver, Colorado 80202
(303) 892-9400

Counsel for Amicus Curiae

---

[11] The Tenth Circuit's retroactivity error is not obviated by the fact that pre-FCLAA leases are readjusted after FCLAA's enactment because pre-FCLAA lessees' antecedent rights in indeterminate leases that may be readjusted only as necessary "to meet materially changed conditions" would be indisputably lost by operation of a statute enacted years after those rights vested. The loss of a vested right by application of a subsequently enacted statute is precisely the circumstance where legal principles preventing retroactive application of a statute come into play.